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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-602**

DONALD W. AGINS and BONNIE G. AGINS,

*Appellants,*

*v.*

CITY OF TIBURON,

*Appellee.*

**On Appeal from the Supreme Court of California**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT-OF-TIME AND *AMICUS CURIAE* BRIEF OF THE STATE OF NEW JERSEY

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT-OF-TIME

Pursuant to Rule 42 (3) of the Rules of this Court, the State of New Jersey respectfully moves the Court for leave to file a brief *amicus curiae* out-of-time in the above entitled case on the ground that due to information conveyed to the Office of the Attorney General of the State of New Jersey, that the Brief of the Appellee, City of Tiburon, was required to be filed with the Court on April

21, 1980, this Office believed that its brief *amicus curiae* in support of Appellee's brief was not required to be filed until that date.

For the foregoing reason the State of New Jersey respectfully urges the Court to grant this motion for leave to file the accompanying brief *amicus curiae* out-of-time in support of the brief of the Appellee, City of Tiburon.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney General of New Jersey,
*Attorney for the State of New Jersey.*

STEPHEN SKILLMAN,
Assistant Attorney General.

Dated: April 9, 1980.



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## *AMICUS CURIAE* BRIEF OF THE STATE OF NEW JERSEY

### Interest of the *Amicus*

The State of New Jersey has filed a separate *amicus curiae* brief in this matter because the resolution of issues raised here will undoubtedly affect important and wide

ranging legislative programs carefully fashioned to preserve the environment and the resources of this State. Appellants challenge a decision of the Supreme Court of California which, *inter alia,* limits the remedies available to a landowner who claims that he has been deprived of substantially all use of his propery as a result of restrictive land use legislation. The California Court has held that such persons may not seek damages in inverse condemnation but rather must seek invalidation of the restrictive legislation by way of an action for declaratory relief or administrative mandamus. If this decision is reversed by this Court, New Jersey's ability to develop innovative and flexible land use programs which address major environmental concerns will be seriously hampered. Responsible public officials will fear the financial consequences should good faith attempts to limit land use be held to "take" private property. Damage awards will act as a deterrent to important and worthwhile planning efforts designed to protect the precious resources of the State.

The magnitude of the pollution problem in New Jersey becomes more apparent each day as entire water supply systems are declared unsafe and hazardous chemicals are found indiscriminately dumped over the land. Haphazard growth and development has brought about much of the destruction. We know now that the State's resources are finite and that we must preserve whatever is not yet irretrievably lost.

The New Jersey legislature has enacted comprehensive land use statutes which promote orderly and appropriate development while insuring that those resources are not squandered. These regulatory programs form the basis for a State effort to halt the deterioration of the environment and, at the same time, create a framework for rational, planned growth.



The first such environmental land use legislation in New Jersey, N.J.S.A. 58:1-26 *et seq.,* was passed in response to long standing flood hazards exacerbated by intensive development along stream corridors throughout the State. Its purpose was "to safeguard the public against danger from the waters impounded or affected by . . . structure[s]" within the channel of any stream. N.J.S.A. 58:1-26. This statute provided some measure of flood protection by controlling development which altered the capacity of streams to carry and retain storm water.

More recently, L. 1979, ch. 359 (originally enacted as L. 1962, ch. 19 and codified at N.J.S.A. 58:16A-50 *et seq.*) established a delineation and regulatory program for flood prone areas so as to permit the State to more effectively deal with the recurring flooding problems encountered in New Jersey river basins. Pursuant to this legislative mandate the State Department of Environmental Protection (hereinafter "DEP") has promulgated regulations which establish prohibited uses and exceptions thereto, non-regulated uses and regulated uses. See N.J.A.C. 7:13-1.4, 1.5, 1.6. Structural development and alteration of ground contours and water channels are generally prohibited in the floodway, as are the storage and processing of pesticides, various types of waste and hazardous materials; low hazard uses such as agriculture and recreation are permitted or not regulated.

Presently, owners of land located in the floodway have brought suit in the Superior Court of New Jersey alleging that the above-mentioned statutory provisions and the regulations adopted thereunder have resulted in a taking of their property without compensation contrary to the N.J. Const. art. 1, para. 20 and the U.S. Const. amend. V. *Usdin and Hirsch* v. *State,* No. 6-35552-76 (Law Div. N.J., filed May 4, 1977). Additionally, plaintiffs claim that the DEP has prevented them from constructing an

industrial building upon their property and has thus unreasonably sought to preserve open space for the benefit of the public by means of the State's police power. Finally, plaintiffs request damages or an order compelling defendant to initiate condemnation proceedings.[1]

The delineation of flood hazard areas reflects a new understanding of their importance as natural flood retention basins. The importance of the State's coastal wetlands was recognized by the New Jersey legislature in 1970 by the passage of the Wetlands Act, N.J.S.A. 13:9A-1 *et seq.* This Act directs the Commissioner of the DEP to inventory and map the State's wetlands and authorizes him to adopt "orders regulating, restricting or prohibiting dredging, filling, removing, or otherwise altering, or polluting coastal wetlands." N.J.S.A. 13:9A-2. Under N.J.S.A. 13:9A-4 no person may conduct a "regulated activity"[2] on mapped wetlands without a permit; however, N.J.S.A. 13:9A-6 specifically provides that any person whose lands are affected by an order or permit may file a complaint in the Superior Court of New Jersey "to determine whether such order or permit so restricts or otherwise affects the use of his property as to deprive him of the practical use thereof." In such a case, if the

[1] In *Schroth* v. *DEP*, No. A-229-78 (App. Div. N.J. Mar. 25, 1980), plaintiffs sought and were denied similar relief because they had not demonstrated that they had been deprived of substantially all use of their property.

[2] "Regulated activity" includes "draining, dredging, excavation or removal of soil, mud, sand, gravel, aggregate of any kind or depositing or dumping therein any rubbish or similar material or discharging therein liquid wastes, either directly or otherwise, and the erection of structures, driving of pilings, or placing of obstruction, whether or not changing the tidal ebb and flow." N.J.S.A. 13:9A-4(a).



court finds that there has been an unreasonable exercise of the police power the legislature has expressly approved but one remedy—the invalidation of the order or permit as applied to the complainant's property.

In the seventeen years prior to the passage of the Wetlands Act, an average of 1,900 acres of New Jersey coastal wetlands were lost to development each year. Since the Act the DEP has permitted the development of only 375 acres through the issuance of 116 permits (as of August 31, 1977). In two cases where permits have been denied the New Jersey Courts have determined that the individual plaintiffs were not thereby deprived of the practical use of their lands. *American Dredging Company* v. *State,* 169 N.J. Super. 18, 404 A.2d 42 (App. Div. 1979), and *Carton* v. *State of New Jersey,* No. A-638-73 (App. Div. Jan. 27, 1978). Similar challenges can be expected in the future.

The wetlands actually encompass a small part of the New Jersey coastal area regulated by the DEP. The Coastal Area Facility Review Act of 1973, N.J.S.A. 13:19-1 *et seq.* (hereinafter "CAFRA"), is the State's major coastal legislation. This statute is a comprehensive legal mandate for the DEP to control and plan the development of a "unique, irreplaceable and delicately balanced" area of New Jersey known as the coastal zone. See N.J.S.A. 13:19-2; N.J.S.A. 13:19-16. In enacting CAFRA the legislature sought to protect the natural resources of this zone while promoting wise, ecologically sensitive development. N.J.S.A. 13:19-2. The DEP was given the task of weighing the need to preserve New Jersey's coastal environment against competing economic pressures through permit decisions which balance these interests according to the statutory dictates.

Thus, the CAFRA statute requires that an applicant submit a rigorous environmental analysis of a proposed

project and its impact upon the site and the surrounding region. N.J.S.A. 13:19-7. Only if it is found that the project will cause minimal impairment may a CAFRA permit issue and, even then, the DEP is given wide latitude to impose conditions upon the project if its construction would "tend to violate the purpose and intent of the act" or if it would "materially contribute to an already serious and unacceptable level of environmental degradation or resource exhaustion." N.J.S.A. 13:19-11.

Where an applicant has been denied a permit to construct a facility within the coastal area, he may challenge that denial through an administrative appeal process. In one such case, an applicant has sought approval for a housing development to be constructed, in part, along the natural waters edge where the seasonal high water table is at the surface; in another, a natural area suitable for agricultural uses because of its highly fertile soils has been proposed as a site for similar residential development. Both applicants have alleged that the DEP's refusal to allow the proposed development constitutes a taking without just compensation.

The CAFRA regulatory scheme operates within a planning framework established in N.J.S.A. 13:19-16. Pursuant to this section of the Act, the Commissioner of the DEP prepared an inventory of both the "environmental resources" and "the existing facilities and land use developments within the coastal area" as well as "an estimate of the capability of the . . . area to absorb and react to man-made stresses." Subsequently, after further consideration of "environmental values and the legitimate need for economic and residential growth" in the coastal zone, the Commissioner presented a management strategy or final environmental design to the Governor and the State legislature. This management strategy plays a central role in the DEP permit review process.



Two other major regional planning efforts based primarily on a careful balance between environmental values and economic pressures have been authorized by the New Jersey legislature. In 1969, by enacting the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 *et seq.*, the legislature created the Hackensack Meadowlands Development Commission (hereinafter HMDC) to oversee the orderly reclamation and development of approximately 21,000 acres of salt water meadows in the lower Hackensack River basin. Development in the meadowlands has been complicated by uncertainty in regard to land titles as much of the land is now or was formerly flowed by the mean high tide and is thus subject to a claim of title by the State. Additionally, the land is low and flat and the geology and soils make drainage and construction difficult. Many areas in the District have been used as a dumping ground for municipal wastes and the Hackensack River has been contaminated by the discharge of large quantities of sewage and other impurities. Most importantly, a governmental body with regional land use powers and technical expertise to coordinate development while protecting the meadowlands environment was urgently needed. See N.J.S.A. 13:17-1.

The HMDC was charged with the task of formulating a Master Plan to guide development in the District. During the period when the Plan was being prepared, interim zoning measures were adopted whereby further development was permitted only on the fringes of the District for a 26 month period. This zoning was unsuccessfully challenged as a taking in *Meadowlands Regional Development Agency* v. *Hackensack Meadowlands Development Commission,* 119 N.J. Super. 572, 293 A.2d 192 (App. Div. 1972). In 1972, the HMDC adopted its final Master Plan, including codes and standards covering land use, compre-

hensive zoning, subdivisions, building construction and solid waste disposal. Large areas in the Meadowlands, generally undeveloped, were zoned for open space and recreational uses; much of this land is valuable marshland and/or adjacent to the waterways which criss cross the District. Depending upon the availability of funds and the projected costs, the HMDC plans to purchase some of this property for public use. The remainder is subject to limited use restrictions consonant with the environmental requirements of the area. Since these restrictions may well reduce the profit that can be derived from the land, they are likely to be attacked as confiscatory. Indeed, one such action has already been brought in the Superior Court of New Jersey, Law Division, by property owners who seek damages in inverse condemnation based on the park and recreation zoning classification of their property. *L.R.F.C.* v. *HMDC,* No. L-62425-78 (Law Div. N.J. Filed Aug. 16, 1979).

Most recently, the State of New Jersey has embarked on a bold and important new venture in regional land use planning. The Pinelands Protection Act, L. 1979, ch. 111 (to be codified as N.J.S.A. 13:18A-1 *et seq.*), direct a massive planning effort which may well become a model for other ecologically sensitive areas of the nation subject to intense development pressures.

The Pinelands of New Jersey contain about 1,000,000 acres of pristine pine oak forest, cedar bogs and wetlands and extensive ground and surface water resources of high quality which provide a unique habitat for a wide diversity of rare, threatened and endangered plant and animal species. See *N.J. Builders Association* v. *DEP,* 169 N.J. Super. 76 (App. Div.), certif. denied, 81 N.J. 402 (1979). The area covers 20% of New Jersey's total land mass and is the largest contiguous semi-wilderness in the



urban corridor extending from Boston to Washington, D.C.

In late 1978, Congress recognized that "there is a material interest in protecting and preserving" the unique ecology of the Pinelands for "the residents of and visitors to the area." The area was designated as a "Pinelands National Reserve," and an appropriation of $26 million in federal funds was authorized to purchase land of critical ecological value and to devise a comprehensive plan for the management of the Reserve. 16 U.S.C. §471i.

Echoing the concerns of Congress, and decrying the "current pace of random and uncoordinated development and construction" which poses "an immediate threat to the resources" of the Pinelands, the New Jersey legislature enacted the Pinelands Protection Act as a complement to the federal legislation. L. 1979, ch. 111, §2. The Act creates a 15 member Pineland Commission which is mandated to prepare, adopt and implement a comprehensive management plan for the entire area by August 8, 1980. L. 1979, ch. 111, §7. Until that date, stringent limits have been placed upon any construction or development within the Pinelands. L. 1979, ch. 111, §13.

Both the federal legislation and the State Act require the Pinelands comprehensive management plan to consider and detail a wide variety of land and water protection and management techniques, including zoning and regulation derived from State and local police powers, development and use standards, permit systems, and acquisition of conservation easements and other interests in land. 16 U.S.C. §471i(f)(3)(A); L. 1979, ch. 111, §7(d)(1). Both Congress and the State legislature have specifically directed that the management plan "include a policy for the use of State and local police power responsibilities to the *greatest extent practicable* to regulate the use of land and

water resources . . . ." 16 U.S.C. §471 i(f)(3)(B); L. 1979, ch. 111, §7(d)(2) (emphasis added). By providing for protection of acres of critical ecological importance through purchase, and protection of the rest of the vast Pinelands through regulation, both legislatures have sought to safeguard the entire area in the public interest. Although high land prices and limited funds make purchase of the entire Pinelands impossible, those lands which are most sensitive will be acquired while the remaining acreage will be subject to appropriate regulatory restraints.

The goal of the comprehensive management plan is to "preserve an extensive and contiguous area of land in its natural state" in the 500,000 central core of the Pinelands by promoting agricultural, horticultural and recreation uses and "prohibit[ing] any construction or development which is incompatible with the preservation of this unique area." L. 1979, ch. 111, §8(c). Outside the central core, the plan must "preserve and maintain the essential character of the existing pinelands environment," promote the expansion and continuation of agriculture, and "discourage piecemeal and scattered development." *Id.* §6(b). Compatible residential, commercial and industrial development is to be encouraged by the plan "in or adjacent to areas already utilized for such purposes in order to accommodate regional growth influences in an orderly way while protecting the pinelands environment from the individual and cumulative adverse impacts" of such development. *Id.*

Once the comprehensive management plan is adopted by the Pinelands Commission it in effect supersedes all other zoning laws for the area, and no construction or development will be permitted unless it conforms to the plan. *Id.*, §9(c).



The stringent limitations now in effect in the Pinelands have generated over 150 requests for administrative review. A number of applicants for development approvals have raised the taking issue and more can be expected to do so. The regulatory program developed in the Comprehensive Management Plan will most certainly engender additional challenges.

Innovative approaches to regional land use control are required if important environmental concerns are to be properly addressed. Historically, development in New Jersey and in other areas of this country has been largely unchecked except through local zoning which is necessarily centered on local needs. One result has been the destruction of natural resources that, in some instances, is irreversible. Only in this last decade has there been a State and regional effort to halt irresponsible development and preserve the environment. Only if this effort is successful will our way of life survive.

The holding of the Supreme Court of California allows government the freedom necessary to plan for the future. A reversal by this Court could impose serious financial burdens on small municipalities such as Tiburon and even greater impacts on a State and regional level. Government officials charged with planning and regulatory responsibilities for ecologically important areas would fear potential liability in those many situations where environmental interests collide with development pressures. Well conceived new programs such as New Jersey's Pinelands Protection Act would be impaired if such liability became a reality. While the invalidation of restrictive regulations would call for renewed planning efforts, damage awards would cripple State programs.

Furthermore, since limited funding is available for land acquisition, the choice to purchase must be made with care.

Lands are earmarked for acquisition pursuant to guidelines established by the legislature (see, e.g., New Jersey Green Acres Land Acquisition and Recreation Act, N.J.S.A. 13:8A-35 *et seq.*) and after the completion of a complex, often highly technical, review process. If this Court permits actions in inverse condemnation in a regulatory context, acquisition decisions will be made by a successful litigant who seeks this form of relief rather than a declaratory judgment or administrative mandamus. The State's land use planning efforts would be rendered nugatory in such circumstances.

Clearly, the State of New Jersey has a vital interest in compelling a private property owner to seek invalidation of zoning restrictions rather than a remedy in inverse condemnation.

## ARGUMENT

**Invalidation of regulatory restraints which deprive a landowner of substantially all use of his property affords complete and adequate relief consonant with the Fifth and Fourteenth Amendments to the United States Constitution.**

It has long been a principle of law established by this Court that government may, pursuant to its police power, impose limitations on the use of real property in order to protect the public health, safety and welfare. *Andrus* v. *Allard,* 100 S.Ct. 318 (1979); *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Welsh* v. *Swasey,* 214 U.S. 91 (1909); *Mugler* v. *Kansas,* 123 U.S. 623 (1877). Under traditional due process analysis, an exercise of the regulatory authority of the State must bear a substantial relation to a legitimate governmental purpose. Moreover, the means chosen must be reasonably necessary to achieve the ends sought and not unduly oppressive upon private individuals. *Penn. Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978); *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962). In the land use context, regulation may become unduly oppressive and therefore unreasonable when limitations on use have become so restrictive as to deprive a landowner of substantially all use of his property *Nectow* v. *Cambridge,* 277 U.S. 183 (1928). As stated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* fifty eight years ago:



> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

This rule blends the due process unreasonableness test with the "taking" limitation of the Fifth Amendment to the United States Constitution. The result is a balancing of public benefits and private losses. Indeed, Justice Holmes framed the issue in terms of a continuum in which the permissible exercise of the police power gradually merges into forbidden restraints on private property:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude,

> in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power. *Id.* at 413.

*Pensylvania Coal Co.* v. *Mahon* clearly mandates a case by case analysis in which the public purpose of the challenged legislation is weighed against the extent of deprivation imposed on private property. *Accord, Penn. Central Transp. Co.* v. *New York City,* 438 U.S. at 123-128; *see generally* W. Stoebuck, "Nontrespassory Takings in Eminent Domain" (1977); F. Bosselman, D. Callies & J. Banta, "The Taking Issue" (1973); "Development in the Law—Zoning," 91 Harv. L. Rev. 1427, 1481-1482 (1978).

The case at bar involves local "open space" zoning required by State law which limits the use of appellants' property to one family dwellings, open space uses and accessory buildings and uses. As interpreted by the California Supreme Court, the RPD-1 classification of the five aces held by Donald and Bonnie Agins permits one residence as of right and four additional residences at the discretion of the City of Tiberon depending upon the proposed design and the results of an environmental review of the plans. Appellants claim that the restrictions imposed by the City effect a taking of their land without payment of just compensation and seek both declaratory relief and damages, amounting to two million dollars, in inverse condemnation. *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 270-272, 598 P.2d 25, 26-27, 157 Cal. Rptr. 372, 373-374 (1979).

The California Court held preliminarily that "remedy by way of damages in eminent domain is not . . . available" in a case where governmental regulations exceed constitutional limits. *Id.* at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375. A landowner alleging that he has been deprived of substantially all use of his land must seek invalidation of the limiting legislation under the Fifth Amendment to the United States Constitution prohibiting the "deprivat[ion] of . . . property, without due process of law" or the taking of property "for public use, without just compensation." In reaching this conclusion, Justice Richardson reaffirmed the balancing test enunciated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon.* He suggested, however, that the Holmes' rule—"if regulation goes too far it will be recognized as a taking"—had "generated some confusion" in regard to whether damages were available as a remedy in zoning cases. He pointed out that the Supreme Court had not granted damages in that case but rather had "declared void the exercise of police power which had limited the company's right to mine its land." *Id.* at 274, 598 P.2d at 29, 157 Cal. Rptr. 376.



In fact, this Court has awarded damages in inverse condemnation only in those cases involving non-regulatory governmental action or where there has been a physical invasion of property by government. *See, e.g., United States* v. *Causby,* 328 U.S. 256 (1946); *See also,* Note, "Inverse Condemnation: Its Availability in Challenging the Validity of Zoning Ordinances, 26 Stan. L. Rev. 1439, 1442, 1443 n. 16 (1974). Cases cited by appellants supposedly permitting damages in a regulatory setting fall within this category and are therefore inapposite. Thus, in *Hurley* v. *Kincaid,* 285 U.S. 95 (1932), Congress had authorized a flood control project on the Mississippi River to improve the carrying capacity of the main channel, raise levees and provide diversion channels for overflow waters. Plaintiff's land lay within the proposed floodway channel. Justice Brandeis found that "in-

tentional, additional, occasional flooding of . . . land constitutes a taking," 285 U.S. at 103, and that, in these circumstances, a damages remedy would be appropriate. 285 U.S. at 104. *Dugan* v. *Rank,* 372 U.S. 609 (1963), *Fresno* v. *California,* 372 U.S. 627 (1963), and *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950) present analogous fact situations in which physical takings due to government projects are at issue.

The teaching of these cases is that where an actual physical invasion, or action tantamount to such invasion, is involved, then the Fifth Amendment mandates an award of "just compensation." But, where substantially all use has been denied as a result of overly restrictive regulation, invalidation of the restrictive statute restores the land to the owner. While physical takings are largely irreversible, removal of regulatory restraints which offend the Constitution permits a litigant to utilize his property as before. Due process does not and should not require more.

Moreover, as persuasively presented by the California Supreme Court, policy considerations strongly militate against a damages remedy in cases involving unconstitutional restrictions on property. Early in this century, Justice Sutherland recognized that proliferating development would require new controls by government:

> " 'The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly.' " *Euclid* v. *Ambler Realty Co.,* 272 U.S. at 392 (citation omitted).



Such limitations are even more necessary today. We have either squandered our natural resources or rendered them unusable for many generations. The results of our indiscriminate use of the land have been forcefully brought to public attention by the closure of contaminated public water supply systems and the shortage of vitally needed resources. We must plan for the future through broad state and regional land use programs designed to halt deterioration of the environment and reclaim our dwindling resources.

New Jersey has, particularly in the last decade, moved vigorously to control development and preserve the land. Presently, as noted herein, the State Department of Environmental Protection regulates flood prone areas and coastal wetlands pursuant to L. 1979, ch. 359 (originally enacted as L. 1962, ch. 19 and codified at N.J.S.A. 58:16A-50 *et seq.*) and N.J.S.A. 13:9A-1 *et seq.* (The Wetlands Act). By limiting land use along the State's waterways New Jersey hopes to lessen the dangers of recurrent and increased flooding and, particularly in the Wetlands, to maintain the delicate ecological balance vital to the preservation of many forms of aquatic life. Additionally, the DEP controls development throughout the State's coastal zone under N.J.S.A. 13:19-1 *et seq.* (The Coastal Area Facility Review Act of 1973). This statute requires coastal zone planning which balances "environmental values and the legitimate need for economic growth within the coastal area" in order to develop a management strategy for New Jersey's coast. N.J.S.A. 13:19-16.

Finally, the New Jersey legislature has authorized major regional planning efforts in the Hackensack Meadowlands and in the 1,000,000 acre Pinelands Reserve located in the central and southern part of the State. See N.J. S.A. 13:17-1 *et seq.* (The Hackensack Meadowlands Re-

clamation and Development Act) and L. 1979, ch. 111 (to be codified at N.J.S.A. 13:18A-1 *et seq.* as The Pinelands Protection Act). Both the meadowlands area and the pinelands are under intense development pressures; both contain many acres of undeveloped and ecologically valuable land. The New Jersey legislature has directed the Hackensack Meadowlands Development Commission to prepare a comprehensive land use plan which insures that future development in the District will proceed in accordance with goals set by the legislature. See N.J.S.A. 13:17-1. In the pinelands, the Pinelands Commission has been designated as the agency charged with the planning function. The Commission must consider a variety of management techniques ranging from outright acquisition to regulatory restrictions on the use of land. L. 1979, c. 111, §7(d)(1). Decisions to purchase are made as a result of the planning process by individuals who have reviewed a wide range of options and have weighed available alternatives.

To permit individuals through inverse condemnation to circumvent the decisions of the planners would be to permit the destruction of this process. Public officials would be stripped of their discretionary power to chose for acquisition those lands best suited to the public purpose. *Cf. Charles* v. *Diamond,* 41 N.Y.2d 317, 332, 360 N.E.2d 1295, 1305, 392 N.Y.S.2d 594, 604 (1977). As Justice Richardson has concluded, "planners must be permitted the flexibility that their work requires." 24 Cal.3d at 274, 598 P.2d at 29-30, 157 Cal. Rptr. at 375. Moreover, as the California Supreme Court also recognized, a damages remedy would stifle innovative land use planning because of the potential drain on the State treasury.

The adverse impacts of a remedy in inverse condemnation are not counterbalanced by any commensurate bene-



fits to individual litigants. Property owners denied the beneficial use of their lands by restrictive legislation are entirely restored by invalidation of such legislation.

## CONCLUSION

**It is respectfully submitted that the decision of the Supreme Court of California that a landowner aggrieved by legislation which substantially limits the use of his property may seek to etablish the invalidity of such legislation but may not recover damages in inverse condemnation should be affirmed.**

Respectfully submitted,

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